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The Developing World Takes on the Tobacco Industry: An Analysis of Recent Litigation and Its Future Implications

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THE DEVELOPING WORLD TAKES ON THE TOBACCO INDUSTRY: AN ANALYSIS OF RECENT LITIGATION AND ITS FUTURE IMPLICATIONS

BRIAN S. APPEL *

| | |
|---|-----|
| INTRODUCTION | 810 |
| I. BACKGROUND..... | 813 |
| A. TOBACCO LITIGATION IN THE UNITED STATES..... | 813 |
| B. THE GUATEMALA DECISION | 816 |
| C. AN ANALYSIS OF THE REMOTENESS DOCTRINE..... | 818 |
| 1. <i>The Application of the Holmes Factors</i> | 818 |
| a. The First Holmes Factor | 819 |
| b. The Second Holmes Factor..... | 823 |
| c. The Third Holmes Factor | 825 |
| 2. <i>Intentional versus Negligent Conduct</i> | 828 |
| II. IMPLICATIONS FOR FUTURE LAWSUITS..... | 830 |
| III. RECOMMENDATIONS | 834 |
| A. THE TOBACCO INDUSTRY'S BEHAVIOR IN THE DEVELOPING WORLD | 834 |
| B. PARENS PATRIAE STANDING | 838 |
| C. APPLICATION OF PARENS PATRIAE TO THE TOBACCO LITIGATION | 840 |
| 1. <i>A Developing Nation's Health and Physical Well Being</i> .. | 840 |
| 2. <i>A Developing Nation's Economic Well Being</i> | 842 |

* J.D. Candidate, May 2002. American University, Washington. College of Law; B.A., Political Science, 1996. Colgate University. I would first like to thank my parents, Steve and Ellen Appel, whose constant support and encouragement have enabled me to succeed in any endeavor. I would also like to thank the *International Law Review* staff for their guidance and suggestions throughout the publication process. In particular, I am deeply indebted to the efforts of my editor, Camilla Lee, whose insights and advice enabled me to better articulate many of the arguments in this Comment.

| | |
|--|-----|
| D. LIMITS ON PARENS PATRIAE STANDING | 843 |
| CONCLUSION | 844 |

INTRODUCTION

In May 1998, Guatemala initiated a lawsuit against Philip Morris and several of the world's leading tobacco manufacturers in United States District Court, seeking compensatory and punitive damages for the cost of treating its citizens' tobacco-related illnesses.¹ In particular, Guatemala alleged that the U.S. tobacco industry had willfully misrepresented the health risks associated with smoking, and had manipulated the level of nicotine in cigarettes so that the Guatemalan people would remain addicted.² Shortly after Guatemala initiated its suit, Ukraine, Bolivia, Venezuela, Nicaragua, and the Brazilian state of Goias brought their own actions, using similar arguments as those set forth by Guatemala.³

1. See Ann Davis, *Guatemala Sues Tobacco Firms to Recover Health-Care Costs*, WALL ST. J., May 13, 1998, at B13 (explaining that affiliates of many American tobacco companies are involved in the suit because they control a substantial part of the Guatemalan cigarette market); see also Ron Nissimov, *Guatemala Sues U.S. Tobacco*, NEWS & OBSERVER (RALEIGH, N.C.), May 15, 1998, at A20 (stating that Guatemala sought \$800 million in compensatory damages and \$2.4 billion in punitive damages); Plaintiff's First Amended Complaint at Paras 5-15, *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d 125 (D.D.C. 1999) (No. 98-CV-01185) (listing and describing the following defendants: the Tobacco Institute Inc.; the Council for Tobacco Research—U.S.A.; B.A.T. Industries, PLC; the British American Tobacco Co., Ltd.; BATUS Holdings, Inc.; Brown and Williamson Tobacco Corporation; Philip Morris Companies, Inc.; Philip Morris Incorporated; Philip Morris International, Inc.; Liggett Group, Inc.; Brooke Group Ltd.).

2. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d 125, 127 (D.D.C. 1999) (discussing the basis of Guatemala's complaint).

3. See Bill Miller, *U.S. Rejects Guatemala Suit; Judge Says It Cannot Prove 'Direct Injury' by Cigarette Makers*, WASH. POST, Dec. 31, 1999, at A20 (stating that the foreign governments' lawsuits are likely to be decided in the same manner as Guatemala's since they are all being heard by the same judge in the U.S. District Court of the District of Columbia). While transferring Bolivia's lawsuit to the District Court of the District of Columbia, a federal judge in Texas used disparaging and sarcastic language in describing the suit's merits. See *Republic of Bolivia v. Philip Morris Cos., Inc.*, 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999) ("Why none of these countries seems to have a court system their own governments have confi-

The U.S. District Court of the District of Columbia dismissed Guatemala's lawsuit, stating that the government's injury was too attenuated and completely contingent upon the harm incurred by the Guatemalan people.⁴ The remoteness doctrine, which provided the basis of Judge Paul Friedman's decision, prevents a plaintiff from claiming injuries that stem from some type of direct harm exacted on a third party, such as an individual Guatemalan smoker.⁵ Thus, the court held that the defendants' actions were not the proximate cause of the government's alleged injuries.⁶ Because the Guatemalan government's injuries were so remote, the court concluded that the amount of money spent on treating its citizens was too speculative to calculate.⁷ The court ultimately suggested that the Guatemalan people could seek redress for this problem in their own court system.⁸

This Comment argues that the remoteness doctrine should not automatically bar claims by developing nations against the tobacco industry. This Comment further asserts that the doctrine of *parens patriae*⁹ should enable a developing nation to bring suit against the

dence in is a mystery to this Court . . . This Court seriously doubts whether Brazilia county has ever seen a live Bolivian . . . even on the Discovery Channel.").

4. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 126 (dismissing Guatemala's claims).

5. See *id.* at 128 (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992)) ("Under the doctrine of remoteness, a plaintiff who complains of harm 'flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover.'"). See generally Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421, 423 (1999)(stating that the remoteness doctrine is an important limit on liability especially when a plaintiff asserts a derivative injury).

6. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 129-30 (asserting that the actions of the individual Guatemalan smoker served as an intervening link between the defendants and the Guatemalan government).

7. See *id.* at 130 (arguing that it would have been too difficult to predict the success of any smoking cessation efforts the Guatemalan government would have taken had it not been misled by the tobacco industry).

8. See *id.* at 134 (discussing why the Guatemalan government cannot obtain standing in the United States under the doctrine of *parens patriae*).

9. *Parens patriae* allows a state to bring a claim on behalf of its citizens. For a complete discussion of the *parens patriae* doctrine and recommendations as to how it can be applied to a Third World nation's suit against the tobacco industry, see

tobacco industry in the United States.

Part I discusses *In re Tobacco/Governmental Health Care Costs Litigation*¹⁰ ("the Guatemala decision" or "the Guatemala court"), and explores how the court may have misapplied the remoteness doctrine. Part II examines how the Guatemala decision and other recent developments may affect the ability of foreign governments and international entities to initiate future suits against the tobacco industry.¹¹ Part III argues that claims brought by developing nations are readily distinguishable from suits filed by domestic entities in the United States. The absence of warning labels,¹² the ability of tobacco manufacturers to manipulate an unsuspecting populace,¹³ and the lack of individual resources¹⁴ present unique circumstances for a developing nation to file a lawsuit. Finally, this Comment recommends how a developing nation may use these unique factual circumstances

infra Part III.

10. 83 F. Supp. 2d 125 (D.D.C. 1999).

11. See Milo Geyelin, *Tobacco Lawsuit Filed By Guatemala Dismissed by Judge*, WALL ST. J., Dec. 31, 1999 at B7 (suggesting that the dismissal foretold "an early end" to similar pending suits brought against the Industry by other foreign countries, such as Venezuela, Bolivia, Nicaragua, and the Ukraine); see also Gordon Fairclough & Milo Geyelin, *Tobacco Companies Rail Against Verdict, Plan To Appeal \$144.87 Billion Award*, WALL ST. J., July 17, 2000, at A3 (analyzing the largest punitive damages award ever and examining its long term effect on the financial condition of the tobacco industry).

12. See *Economics of Tobacco-Database*, available at http://www.worldbank.org/tobacco/brieflist_db_print.asp (last visited June 17, 2000) [hereinafter *Economics of Tobacco*] (stating that Guatemala did not require any type of health warnings on cigarette packaging until 1990).

13. See generally Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U.L. REV. 1, 28 (1991) (stating that the harmful effects of marketing and promotional activities in the developing world are even greater given the lack of education and governmental regulation); World Health Organization Information-Fact Sheets: *The Tobacco Epidemic in Latin America* at <http://www.who.int/inf-fs/en/fact196.html> (May 1998) [hereinafter *WHO Fact Sheets*] ("Tobacco advertising and promotions by multinational tobacco companies are prolific throughout the region. Multinational tobacco companies are frequent sponsors of sports and cultural events, many of which are popular with young people.").

14. See generally Pan American Health Organization: Guatemala, available at <http://www.paho.org/english/SHA/prflgut.htm> (last visited June 17, 2000) [hereinafter *Pan American Health Organization*] (stating that 75.2 percent of the Guatemalan people live in poverty).

to obtain standing in United States federal courts against the tobacco industry ("Industry") under the doctrine of *parens patriae*.¹⁵

I. BACKGROUND

A. TOBACCO LITIGATION IN THE UNITED STATES

In the 1950s, individual plaintiffs began suing the Industry in the United States under various products liability theories and for the breach of an implied warranty of merchantability.¹⁶ The Industry prevailed in these suits because it successfully argued that the plaintiffs had made an initial decision to smoke, thus assuming a risk that contributed to their own health conditions.¹⁷ Moreover, smokers' efforts to hold the Industry liable were further frustrated by the Cigarette Labeling and Advertising Act,¹⁸ which placed individual plaintiffs on notice of the dangers associated with smoking.¹⁹ These decisions,

15. See *Pennsylvania v. Kleppe*, 533 F.2d 668, 673 (D.C. Cir. 1976) (explaining that a state may obtain *parens patriae* standing when a quasi-sovereign interest is threatened); see also *infra* notes 153-186 and accompanying text (arguing that tobacco marketing and consumption in the developing world has had a catastrophic effect on both the physical and economic well being of entire nations, making a strong case for *parens patriae* standing).

16. See JOHN VARGO & J.D. LEE, *CIPOLLONE V. LIGGETT GROUP, INC.: U.S. SUPREME COURT OPENS THE DOOR TO TOBACCO LAWSUITS* 5 (Matthew Bender & Co. 1992) (arguing that the Supreme Court decision, *Cipollone v. Liggett Group, Inc.*, will expose the tobacco industry to greater liability by allowing individual injured smokers to bring actions against tobacco companies); see also Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 360 (2000) (providing a brief description of the tobacco litigation in the United States).

17. See, e.g., *Roysdon v. R. J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985) (concluding that tobacco is not an unreasonably dangerous substance because its adverse effects are "part of the common knowledge of the community.").

18. 15 U.S.C. §§ 1331-1341 (1994).

19. See *Stephens v. American Brands*, 825 F.2d 312, 313 (11th Cir. 1987) (holding that the Cigarette Labeling Act enabled the defendant tobacco manufacturer to use a preemption defense in a wrongful death action); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987) stating that the Cigarette Labeling Act "impliedly preempts the [plaintiff's] suit because it disturbs the federally calibrated balance of national interests"; *Roydson*, 623 F. Supp. at 1191 (holding that the defendant manufacturer had fulfilled its duty to warn of the dangers associated with smoking by complying with the requirements set forth by the Cigarette La-

which shielded the Industry from any sort of liability, soon came under considerable scrutiny.

In 1992, the Supreme Court concluded for the first time that the warnings required by the Cigarette Labeling and Advertising Act did not necessarily shield the Industry from liability.²⁰ Additionally, new revelations about the Industry's fraud and misrepresentations as well as its continued assertion that smoking was not addictive, further eroded the Industry's credibility with both the United States Congress and the public at large.²¹

In response to this increased scrutiny, over forty state attorneys general filed suit against the U.S. tobacco industry during the mid 1990s, seeking damages for the costs of treating individuals who had suffered from smoking-related illnesses.²² The Industry ultimately reached a settlement with forty-six states totaling \$206 billion through the year 2025.²³ Although some of these lawsuits had already

beling and Advertising Act).

20. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519-20 (1992) (holding that the Cigarette Labeling Act only pre-empted state and local authorities from requiring their own types of warning labels but did not prohibit individual plaintiffs from filing common law actions against the tobacco industry).

21. See John Schwartz, *Tobacco Executives Deny Spiking Cigarettes*, WASH. POST, Apr. 15, 1994, at A1 (stating that seven of the nation's leading tobacco executives denied that tobacco was addictive or that they spiked cigarettes with extra nicotine, when testifying before the House Energy and Commerce Committee's subcommittee on health and the environment); see also Suein L. Hwang, *Philip Morris Memo Outlines Strategy To Study How Nicotine Affects the Brain*, WALL ST. J., Apr. 16, 1998 at A24 (analyzing a 1980 memorandum which discussed how Philip Morris may be able to study the effect of nicotine on the brain without being subject to regulatory oversight).

22. See Dagan & White, *supra* note 16, at 363 (asserting that most state lawsuits alleged that the tobacco companies engaged in conspiracy, fraud and antitrust violations).

23. See Sandra Torrey & John Schwartz, *States Approve \$206 Billion Deal With Big Tobacco; Industry Retains Key Marketing Devices*, WASH. POST, Nov. 21, 1998 at A1 (explaining that the settlement does not afford the tobacco industry complete immunity from individual and class action lawsuits). Mississippi, Florida, Minnesota, and Texas had previously settled with the tobacco industry, bringing the its total liability to \$240 billion through the year 2025. See Dagan & White, *supra* note 16, at 370-71, 373 (discussing the history of the tobacco settlement); see also Myron Levin & Kasper Zeuthen, *Groups Urge Global Scope to Tobacco Talks Lawsuits; Foreign Anti-smoking Leaders Say Settlement Negotiations Should Address Industry's Operations Abroad*, L.A. TIMES, June 18, 1997, at D1 (detail-

been dismissed under the remoteness doctrine,²⁴ the tobacco manufacturers decided to settle the cases in order to secure indirect protection from bankruptcy.²⁵ The settlement also protected the established manufacturers from new entrants into the Industry, who were not subject to the settlement's terms.²⁶

Following the states' lead, the United States government,²⁷ several

ing the concerns of leaders in the international anti-smoking movement, who believed that settlement in the United States would force the tobacco industry to accelerate its advertising and marketing campaigns abroad).

24. *Compare* Iowa *ex rel.* Miller v. Philip Morris, Inc., 57 N.W.2d 401, 406-07 (Iowa 1998) (dismissing the state's law suit under the remoteness doctrine, claiming that it would "open the proverbial floodgates of litigation"), with Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 968 (E.D. Texas 1997) (refusing to dismiss Texas' suit against the industry in order to provide the state with an opportunity to quantify its damages).

25. See Dagan & White, *supra* note 16, at 378-79 (explaining how future state plaintiffs could increase the likelihood of positive verdicts by observing earlier trials and learning from the mistakes of previous plaintiffs).

26. See *Cigarette Prices Rise Sharply in Wake of States' Tobacco Settlement*, WASH. POST, Nov. 24, 1998, at A5 (detailing the cigarette price increases that resulted from the tobacco settlement). Under the settlement, a state would receive less money if a tobacco manufacturer lost a significant portion of its market share to a new entrant into the industry. See Dagan & White, *supra* note 16, at 381-82 (describing the tobacco industry's rationale for settling with the attorneys general). However, if a state adopted the settlement's model statute, which imposed a twenty-cent per-package tax on new entrants, the state would no longer have its settlement money reduced due to new entrants in the market. *Id.* Thus, the settlement's tax would effectively bar new entrants from increasing their market share at the expense of the established manufacturers. *Id.*

27. See *United States v. Philip Morris, Inc.*, No. CIV.A.99-2496 GK, 2000 WL 1477152, at *1 (D.D.C. Sept. 28, 2000) (seeking to recover damages from the tobacco industry under the Medical Care Recovery Act, the Medicare Secondary Payer provisions, and the Racketeer Influenced and Corrupt Organizations Act ("RICO")). During the appropriations process for fiscal year 2000, Congress initially attempted to restrict funding to the U.S. government's lawsuit against the tobacco industry. See H.R. 4635, 106th Cong. (2000) (prohibiting the Clinton Administration from transferring appropriations from the Department of Veterans Affairs to the Department of Justice to fund the tobacco litigation); Eric Pianin, *House Votes to Curb Tobacco Suit Funding*, WASH. POST, June 20, 2000, at A1 (stating that the Department of Justice was utilizing funding from the Departments of Veterans Affairs, Health and Human Services, and Defense to help fund its litigation with the tobacco industry). But see Alan Fram, *Clinton Urges House to Fund Suit Against Tobacco Industry*, WASH. POST, June 23, 2000, at A7 (analyzing an amendment that restored partial funding to the Department of Justice to pursue its litigation against the tobacco industry). The court ultimately dismissed the gov-

municipalities, insurers, health and benefit trust funds, and foreign governments filed suit against the Industry, hoping to recover the costs of treating individuals who had suffered from smoking-related illnesses.²⁸ The majority of courts have dismissed such suits, however, holding that the remoteness doctrine barred such entities from recovering health care costs.²⁹

B. THE GUATEMALA DECISION

In May 1998, several months before the final settlement between the attorneys general and the Industry, Guatemala became the first foreign nation to file suit in the United States.³⁰ Guatemala claimed that the various tobacco companies had conspired to cover up and misrepresent the adverse consequences of smoking, while preventing

ernment's Medical Care Recovery Act and Medicare Secondary Payer Claims, while allowing it to continue pursuing the RICO claim. *See Philip Morris, Inc.*, 2000 WL 1477152, at *2 (concluding that the government had sufficiently articulated the elements of a RICO claim).

28. *See, e.g., Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 232 (2d Cir. 1999) (alleging that the tobacco industry had attempted to deceive the public and the plaintiff trust fund, which resulted in the trust fund having to spend millions in treating its members' smoking-related illnesses). The tobacco industry attempted to consolidate the U.S. lawsuit with the foreign governments' claims. *See In re Tobacco/Governmental Health Care Costs Litigation v. Philip Morris, Inc.*, 76 F. Supp. 2d 5, 9 (D.D.C. 1999) (denying the tobacco industry's request to consolidate both the foreign and U.S. lawsuits because trying the cases separately would not deny the industry an equitable forum by which to adjudicate its claims).

29. *See In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 133 n.5 (citing *International Brotherhood of Teamsters v. Philip Morris, Inc.*, 196 F.3d 818, 827 (7th Cir. 1999); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 968 (9th Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 933 (3d Cir. 1999)) (stating that the majority of state and federal courts have held that "claims by third party payors for tobacco-related health care expenses are too remote and indirect to allow recovery."). *But see Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 85 (D.D.C. 1999) (finding the possibility of proximate cause between the defendant's action and the plaintiff's alleged injury). *But cf. White v. Smith & Wesson*, No. 1:99 CV 1134, 2000 WL 664176, at *9 (N.D. Ohio Mar. 14, 2000) (holding that the city of Cleveland had standing to recover the costs of treating gun violence victims from the defendant gun manufacturer).

30. *See Davis, supra* note 1, at B13 (providing background and commentary on the merits of the lawsuit).

the marketing and sale of less harmful cigarettes.³¹ Relying upon the Industry's misrepresentations, Guatemala saw no reason to implement prevention and cessation programs. As a result, the nation was forced to spend over \$300 million between 1973 and 1997 to treat smoking-related illnesses.³²

The Guatemalan government also argued that its injuries were distinct from the harm suffered by individual Guatemalan smokers.³³ The nation's specific claims of relief included common law fraud and intentional misrepresentation, conspiracy to commit fraud, disregard for the Racketeer Influenced and Corrupt Organizations Act ("RICO"),³⁴ negligence, gross negligence, and negligent misrepresentation.³⁵

The defendants asserted that the remoteness doctrine prevented the Guatemalan government from claiming an injury based upon the misfortunes of the Guatemalan smoker.³⁶ The defendants further argued that the individual choices of Guatemalan smokers broke the causal chain of events between the Industry's conduct and the government's injury.³⁷ Since the government's alleged injury was com-

31. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 127 (summarizing Guatemala's complaint before addressing the defendants' motion to dismiss).

32. See *id.* (asserting that the Guatemala's reliance on the industry's misrepresentations inhibited the creation of prevention programs); see also *Economics of Tobacco*, *supra* note 12 (stating that there are neither advertising restrictions nor minimum age requirements for purchasing cigarettes in Guatemala).

33. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 127 (arguing that the Guatemalan government was not seeking compensation for its citizen's smoking related illnesses but rather for its own proprietary loss).

34. See 18 U.S.C. §§ 1961-1968 (1994) (prohibiting an individual from collecting income either through a conspiracy or a racketeering activity).

35. *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 127. Guatemala's complaint also included allegations that the defendants violated antitrust law and accused the defendants of negligent performance of a voluntary undertaking. *Id.* These issues are not addressed in this Comment as they were summarily dismissed by the court. *Id.* at 134.

36. See *id.* at 129 (arguing that the Guatemalan government's injury is "so attenuated from defendant's alleged wrongful conduct and so indirect as to require dismissal").

37. See *id.* at 129 (explaining how the government's injuries are derivative of the harm suffered by its citizens); see also Schwartz, *supra* note 5, at 435 ("Al-

pletely contingent on the behavior of the Guatemalan smoker, the developing nation was precluded from stating a claim.³⁸ The court ultimately agreed with the defendants and concluded that the government's injury was too remote from the defendants' alleged actions.³⁹

C. AN ANALYSIS OF THE REMOTENESS DOCTRINE

The remoteness doctrine forms one aspect of proximate cause, which generally limits how far liability may extend from a harmful act.⁴⁰ In examining proximate cause, a court must determine whether a plaintiff's injury is both direct and foreseeable.⁴¹ If the plaintiff's injury is either remote or unforeseeable, proximate cause will not exist.⁴²

1. *The Application of the Holmes Factors*

In applying the remoteness doctrine, the Guatemala court examined three policy considerations set forth in *Holmes v. Securities In-*

though the smoker's intervening act itself may not result in the automatic application of the remoteness doctrine, it is relevant to the general issue as to whether a plaintiff's harm is too many steps removed.").

38. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 130 (re-iterating that the Guatemalan government would not have had to pay any medical expenses if the individual citizen had decided not to smoke).

39. See *id.* at 129 (recognizing that the remoteness doctrine is not as "clear cut" as the tobacco manufacturers have stipulated and asserting that courts have a certain degree of latitude in ascertaining whether an injury is too remote from a defendant's harmful action).

40. See *id.* at 128 (stating that a judicial remedy cannot address every specific harm that arises out of an alleged wrongful act); see also *Laborers Local 17 Health and Benefit Fund*, 191 F.3d at 234 ("[B]ecause the consequences of an act go endlessly forward in time and its causes can stretch to the dawn of human history, proximate cause is used essentially as a legal tool for limiting a wrongdoer's liability only to those harms that have a reasonable connection to its actions.").

41. See Schwartz, *supra* note 5, at 429 (demonstrating how proximate cause provides a "conceptual explanation" of the remoteness doctrine). See generally *Holmes*, 503 U.S. at 268 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 42 at 279 (5th ed. 1984)) ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'").

42. See *Laborers Local 17 Health and Benefit Fund*, 191 F.2d at 235 (underscoring that a direct injury and foreseeability are separate concepts).

vestor Protection Corp.⁴³ The first *Holmes* consideration asserts that if a plaintiff's injury is not a direct consequence of the defendant's act, it becomes more difficult to quantify the plaintiff's damages.⁴⁴ The second *Holmes* factor addresses the difficulty courts encounter in trying to apportion damages between numerous parties claiming derivative injuries.⁴⁵ Finally, a court must assess the ability of individual plaintiffs, who have suffered direct injuries, to seek relief on their own behalf.⁴⁶

a. The First *Holmes* Factor

In examining the three *Holmes* factors, the Guatemala decision consistently overlooked important factual circumstances that differentiate a developing nation from a domestic plaintiff.⁴⁷ In applying the first *Holmes* factor, the Guatemala court refused to speculate about the effectiveness of any smoking cessation programs that would have been established had the defendants not misrepresented the dangers associated with tobacco.⁴⁸

43. 503 U.S. 258 (1992).

44. See *id.* at 269 (underscoring the difficulty in separating an injury by a singular act from other independent factors). See generally Recent Cases, *Statutory Interpretation—Second Circuit Holds that Health Care Funds Lack Standing to Sue Tobacco Companies Under RICO*, 113 HARV. L. REV. 1063, 1065 (2000) [hereinafter *Statutory Interpretation*] (demonstrating how the court in *Laborers Local 17 Health and Benefit Fund* failed to account for the doctrine of fraud, when analyzing the three *Holmes* factors).

45. See *Holmes*, 503 U.S. at 269 (stating that indirectly injured parties would force courts to create complex rules for dividing damages, thereby increasing the chance of multiple recoveries).

46. See *id.* (“[T]he need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can be generally counted on to vindicate the law as private attorneys general.”).

47. See *infra* notes 48-97 and accompanying text (discussing how the district court overlooked unique factual circumstances in applying the *Holmes* factors); see also *Laborers Local 17 Health and Benefit Fund*, 191 F.3d at 235 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 42 at 279 (5th ed. 1984)) (“Proximate cause is an elusive concept, one ‘always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.’”).

48. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 131 (analyzing the difficulty of evaluating damages arising from the behaviors and tendencies of individual smokers).

In *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Inc.*⁴⁹ ("SEIU"), the court discussed several weaknesses in this argument.⁵⁰ The SEIU decision is particularly important because it was decided by the U.S. District Court of the District of Columbia only days before the Guatemala decision and involved a trust fund that sought damages from the Industry.⁵¹

In examining the first *Holmes* factor, the SEIU court spent considerable time discussing the standards for a motion to dismiss.⁵² When considering a motion to dismiss, a court must accept the plaintiff's allegations as being true.⁵³ The SEIU court further held that a complaint may only be dismissed when it appears that the plaintiff will not be able to prove any of the facts in support of her claim.⁵⁴ Thus, without analyzing the structure of Guatemala's government or health care system, the court summarily concluded that the government had not suffered any sort of direct injury and that its damages would be impossible to quantify.⁵⁵ In SEIU, however, the court arguably had

49. 83 F. Supp. 2d 20 (D.D.C. 1999).

50. See *id.* at 87 (stating that if the plaintiff trust fund's claims are true, then the tobacco industry created both a substantial and ascertainable harm).

51. See *id.* at 89 (holding that the remoteness of the plaintiff's claims and the difficulty of ascertaining damages did not warrant dismissal).

52. See *infra* notes 53-55 and accompanying text (discussing the obstacles a defendant encounters in seeking a motion to dismiss and applying such rules to the Guatemala decision).

53. See *Service Employees Int'l Union Health and Welfare Fund*, 83 F. Supp. 2d at 74 (quoting *Ramirez de Arellano v. Weinberger*, 83 F. Supp 2d 1500, 1506 (D.C. Cir. 1984)) ("We must accept as true all of the material allegations in the plaintiff's complaint . . . Defendant's factual allegations, if in agreement with the plaintiff's, only reinforce plaintiff's case; if in disagreement must be ignored. Thus, at this early stage of the proceedings, the only relevant factual allegations are the plaintiff's.").

54. See *id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (asserting that a claim should not be dismissed unless a court concludes "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'").

55. In examining Guatemala's health care system, the court merely stated that the nation provides a number of free health benefits to its citizens through public clinics and hospitals. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 127. However, the Guatemalan health care system is undergoing a number of systemic changes, which may make it more susceptible to financial instability. See Pan American Health Organization, *supra* note 14

more familiarity with the structure and inner workings of a domestic trust fund, and withheld its judgment on the validity of the plaintiff's allegations until discovery had occurred.⁵⁶ Thus, the Guatemala court ignored binding precedent and prematurely dismissed the government's claim, without providing it with an opportunity to explain how its damages may be quantified.⁵⁷

Moreover, the enormous sum of money Guatemala spent on treating its citizens' tobacco-related illness clearly constituted both a concrete and legally cognizable injury.⁵⁸ In *White v. Smith & Wesson*,⁵⁹ for example, a U.S. District Court ruled that the money the city of Cleveland had spent on grappling with the effects of gun violence constituted a cognizable injury that had ongoing adverse consequences.⁶⁰ In addition to the costs of treating the victims of gun violence, the city had claimed that it lost significant tax revenue due to lower productivity.⁶¹ Even though an injury of lost tax revenue and

(describing the nation's ambitious expansion of primary health care services); Derek Yach, *Global Threats Demand Global Solutions: Tackling the Tobacco Epidemic*, available at <http://www.tobacco.who.int/en/tfi/dyspeeches.html> (last modified June 15, 2000) [hereinafter Yach] (arguing that the costs of treating tobacco related diseases in the developing world may alter spending patterns and inhibit the ability of a nation's health care system to grapple with more common infectious diseases).

56. See *Service Employees Int'l Union Health and Welfare Fund*, 83 F. Supp. 2d at 87 ("It is not the Court's function to decide, in a motion to dismiss, as opposed to a motion for summary judgment at the close of discovery, whether the Plaintiffs can develop the evidence to support their claims."); see also *Blue Cross and Blue Shield of New Jersey Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 575 (E.D.N.Y. 1999) (refusing to grant a motion to dismiss because the plaintiff insurer could use extensive documentation and statistical analysis to demonstrate the amount of money spent on treating smoking related illnesses).

57. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 130 (denying standing because the court would be forced to speculate on the success of any smoking cessation efforts while having to account for the behaviors of individual Guatemalan smokers).

58. See *id.* at 127 (stating that the Guatemalan government claimed to have spent over \$300 million in between 1973 and 1997 on the costs of treating its citizens tobacco-related illnesses).

59. No. 1:99 CV 1134, 2000 WL 664176 (N.D. Ohio Mar. 14, 2000).

60. See *id.* at *5 ("[P]laintiffs have alleged that they had suffered an 'injury in fact' which is concrete, particularized, and imminent; indeed the harm has already occurred in substantial part and will continue unless unabated.").

61. See *id.* (stating that the city had also claimed an injury based upon having

lower productivity from gun violence appears to be both speculative and attenuated, the court ultimately determined that such harms constituted a real injury.⁶² Cleveland's alleged injury appears to be much more abstract and uncertain than that of the Guatemalan government, which had claimed damages only for the money spent on health care.⁶³ Indeed, the contrast between the two decisions further underscores the Guatemala court's error in ruling that damages would be too speculative to calculate.⁶⁴

Finally, the recent settlement in the United States provided a model by which the Guatemala court could have quantified damages.⁶⁵ Under the terms of the settlement, each state's funding was based upon its overall population, the number of smokers, and the amount of resources each state had previously allocated to its Medicaid program.⁶⁶ If the Industry was able to work with individual at-

to bear the costs of "enhanced police protection, emergency services, police pension benefits, court and jail costs, and medical care.").

62. Cf. ROBERT D. TOLLISON & RICHARD E. WAGNER, *THE ECONOMICS OF SMOKING* 68 (1992) (describing the difficulties in ascertaining the costs of lost productivity due to smoking-related illnesses).

63. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 127 (detailing the developing nation's failure to take the necessary regulatory actions to reduce and prevent tobacco consumption).

64. Compare *Iron Workers Local Union No. Insurance Fund v. Philip Morris, Inc.*, 23 F. Supp. 2d 771, 784 (N.D. Ohio 1998) (allowing the plaintiff's union trust fund an opportunity to demonstrate "that nearly 10 percent of the hundreds of millions of dollars they have spent on health care has been caused by the [tobacco industry's] conduct"), with *International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund*, 34 F. Supp. 2d 656, 661 (N.D. Ill. 1998) (concluding that the plaintiff health and welfare trust fund had failed to articulate how many of their members were smokers, which prevented the funds from estimating the financial impact of tobacco consumption).

65. See Milo Geyelin, *Majority of States Backing Tobacco Deal*, WALL ST. J., Nov. 20, 1998 at B9 (summarizing the provisions of the tobacco settlement, which included a commitment by the industry to fund anti-smoking campaigns, advertising and promotional restrictions, and the establishment of a public health foundation aimed at reducing the prevalence of smoking). See generally C. Everett Koop & David Kessler, *Desperate for a Deal*, WASH. POST, Nov. 20, 1998, at A29 (criticizing the settlement for the lack of disclosure during negotiations, weak advertising restrictions, and the failure to include a provision for federal regulation of tobacco). C. Everett Koop served as the United States Surgeon General between 1981 and 1987. David Kessler served as Commissioner of the U.S. Food and Drug Administration from 1990 to 1997. See *id.*

66. See Suen L. Hwang & Milo Geyelin, *Tobacco: Is Tobacco Settlement Good*

torneys general in devising a methodology for calculating damages, a United States district court could have done the same. Instead of summarily concluding that damages were too speculative to calculate, the court should have undertaken a similar analysis set forth by the U.S. settlement.⁶⁷

b. The Second *Holmes* Factor

In addressing the second *Holmes* factor, the Guatemala court expressed concern that numerous plaintiffs may come forward, seeking identical damages to those claimed by the Guatemalan government, thus increasing the chance of multiple recoveries.⁶⁸ Moreover, the court noted the presence of multiple plaintiffs, which would force it to make cumbersome rules for dividing any damages.⁶⁹ This analysis, however, has several flaws.

First, under RICO, a plaintiff may only recover for injuries to his business or property.⁷⁰ Thus, individual smokers who may have suffered either a physical or emotional injury, could not bring a claim

News for the Industry?, WALL ST. J., Nov. 17, 1998, at B1 (stating that the proposal required "[t]he approval of enough states to cover 80% of the state Medicaid population nationwide..."); see also Dagan & White, *supra* note 16, at 365 (asserting that the tobacco settlement based the proposed payments to the states upon the economic loss to each state's Medicaid program and not based upon the individual suffering of smokers).

67. Compare *Blue Cross and Blue Shield of New Jersey*, 36 F. Supp. 2d at 575 (deciding that the plaintiff insurer could establish the amount of resources spent on tobacco-related illnesses by utilizing experts and "scientific and statistically based evidence."), with *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 130 ("[P]laintiff's damages, if any, would be too speculative and too difficult to ascertain.").

68. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 131 (quoting *Holmes*, 503 U.S. at 269) ("[T]he court would be required to adopt 'complicated rules apportioning damages among plaintiffs removed at different levels of injury . . . to obviate the risk of multiple recoveries.'").

69. See *id.* (underscoring the dangers of multiple recoveries by discussing the collateral source rule, which would permit individual plaintiffs to "recover their own medical expenses irrespective of Guatemala's having already paid their medical bills or costs.").

70. See 18 U.S.C. § 1964 (C) (1994) (limiting civil remedies to individuals injured in their business or property transactions and enabling plaintiffs to recover three times the damages and the litigation costs that reflect a reasonable attorney's fees).

against the Industry under the statute.⁷¹ Aside from individuals filing suit, courts have expressed concern that employers who subsidize health insurance costs may also seek damages under RICO.⁷² In a RICO type offense, however, a court must examine whether or not a plaintiff relied on the defendant's alleged fraud and misrepresentations.⁷³ An employer, unlike a governmental body, cannot argue that it relied on the Industry's misrepresentations when deciding how to allocate health care spending and what types of programs to enact.⁷⁴ In contrast, an employer or insurer simply makes coverage decisions. Moreover, in a developing nation like Guatemala, very few people even receive health insurance through their employer, which further reduces the risk of multiple recoveries.⁷⁵ Therefore, the risk of multiple recoveries is substantially diminished under RICO, particularly in developing nations such as Guatemala.

In addition, the Guatemala decision fails to consider fully the single satisfaction rule, which would enable the Industry to use any damages awarded to the government as credit toward subsequent overlapping lawsuits by individual smokers and employers.⁷⁶ Thus,

71. See *Iron Workers Local Union No. 17 Insurance Fund*, 23 F. Supp. 2d at 785 (stating that under RICO, "medical expenses paid on behalf of an injured smoking beneficiary could not make up a monetary loss or other injury to a smoker's business or property.").

72. See, e.g., *Laborer's Local 17 Health and Benefit Fund*, 191 F.3d at 240 (holding that either employers or health insurers who contract with the plaintiff trust funds may also file suit against the tobacco industry).

73. See *Statutory Interpretation*, *supra* note 44, at 1065-66 (arguing that when a plaintiff makes a claim under RICO, courts should examine more closely the doctrine of fraud rather than the more "rigid" analysis set forth by a proximate causation analysis).

74. See *id.* at 1067-68 (asserting that "the doctrine of fraud underlying the defendants' offenses in [*Laborer's Local 17 Health and Benefit Fund v. Philip Morris, Inc.*]" would not apply to employers because they would be unable to show that they relied upon the industry's misrepresentations in deciding how much to contribute to the plaintiff trust funds).

75. See *Pan American Health Organization*, *supra* note 14 (stating that 25% of the Guatemalan population receives their health insurance through the government while 10% of the population receives insurance through private employers). Overall, less than 60% of Guatemalan citizens receive any sort of health coverage. *Id.*

76. See *Service Employees Int'l Union Health and Welfare Fund*, 83 F. Supp. 2d at 88 (concluding that the defendant tobacco industry's fear of multiple recoveries "is not an effort to protect against duplicative recoveries, but an effort to pre-

the single satisfaction rule further reduces the possibility that the Industry would have to pay multiple times for the same injury.”

c. The Third *Holmes* Factor

Finally, in examining the third *Holmes* factor, the Guatemala court concluded that a more directly injured plaintiff, the individual Guatemalan smoker, was the most appropriate party to file suit.” In particular, the *Holmes* decision held that directly injured individuals were best suited to deter a defendant’s dangerous conduct by acting as “private attorneys general.”⁷⁹

In ruling that an individual Guatemalan smoker was the most appropriate party to file suit, the Guatemala decision overlooked several liability-limiting factors, which may be unique to a developing nation.⁸⁰ For instance, seventy-five percent of Guatemala’s citizens live in poverty and fifty-eight percent of its citizens live in extreme poverty.⁸¹ Moreover, thirty-seven percent of the nation is unemployed.⁸² Even if an individual plaintiff had the resources to file a lawsuit in the United States, she must also often overcome a judg-

vent any recovery”); *Iron Workers Local Union No. 17 Insurance Fund*, 23 F. Supp. 2d at 785 (“The payment by defendants of a judgment or settlement would give the defendants a defense of satisfaction in any other suit in which an injured smoker/trust beneficiary might be able to recover any of the suits sought here.”).

77. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 131, n.3 (explaining that in the current case, there are “potentially multiple plaintiffs seeking compensation for the same injury” rather than an individual plaintiff seeking to recover multiple times from various defendants). In this footnote, the Guatemala decision took issue with the SEIU court’s application of the single satisfaction rule, asserting that the rule only forbids an individual plaintiff from recovering numerous times for the same injury from multiple defendants. *Id.*

78. See *id.* at 132 (asserting that the Guatemalan people were capable of filing suit to recover damages arising from smoking-related illnesses).

79. 503 U.S. at 269-70.

80. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 132 (citing a newspaper article where individual American plaintiffs won judgements against the tobacco industry).

81. See *Pan American Health Organization*, *supra* note 14 (describing how Guatemala’s overall health population and economic status has begun to improve since a 1996 peace accord was signed between the government and certain guerilla forces).

82. See *id.* (analyzing the various demographics of Guatemala).

ment of forum non conveniens,⁸³ which virtually assures that the foreign plaintiff will not be able to recover.⁸⁴ All of these practical considerations would make it virtually impossible for individual Guatemalan smokers to advocate on their own behalf as "private attorneys general."⁸⁵

Additionally, under RICO, an individual plaintiff is not the most appropriate party to seek recovery for the Industry's fraud and deception. As previously discussed, to recover under RICO, an individual smoker would need to show an injury to either her business or property.⁸⁶ Moreover, a RICO claim arises when a plaintiff detrimentally relies on the misrepresentations of the defendant.⁸⁷ An individual smoker, as opposed to a governing body, would have a more difficult time proving that she relied upon the Industry's fraudulent claims in deciding whether or not to smoke.⁸⁸ For example, a defendant may have known the dangers associated with smoking but de-

83. See BLACK'S LAW DICTIONARY 655 (6th ed. 1990) (defining forum non conveniens as the inherent power within a court to refuse jurisdiction, particularly when justice would be better served in a different forum).

84. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 866 (S.D.N.Y. 1986) (concluding that the Indian court system was best suited to handle the claims of the thousands of Indian citizens who were either injured or killed by a gas leak at an Indian factory owned by an American corporation). In invoking the doctrine of forum non conveniens, the U.S. district court concluded that Indian courts would have greater access to information about the accident. *Id.* The court also cited the enormous administrative burdens of holding the trial in the U.S., the excessive costs of the litigation, and the public interest the Indian government had in seeing the case tried in India. *Id.*; see also *Johnson*, *supra* note 13, at 55 ("[I]n fact, the doctrine is favored by multinational corporations because a forum non conveniens dismissal is often outcome determinative, effectively defeating the claim and denying the plaintiff recovery."). See generally *Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1984) (establishing the process by which a court may apply the doctrine of forum non conveniens).

85. *Holmes*, 503 U.S. at 269-70.

86. See, e.g., *Iron Workers Local Union No. 17 Insurance Fund*, 23 F. Supp. 2d at 784 (asserting that medical expenses paid by an injured smoker would not constitute a loss to either business or property).

87. See *Statutory Interpretation*, *supra* note 44, at 1066 (asserting that courts have not "rigidly adhered" to proximate causation analysis, when discussing claims under RICO.).

88. See *id.* at 1068-68 (demonstrating the difficulty an individual smoker would have in proving that she would have quit smoking but for the industry's fraud and misrepresentations).

cided to do it anyway. In contrast, a governmental body is more likely to keep detailed records of its decision-making process, thereby making it easier to determine whether it relied on the Industry's fraud.⁸⁹ The mere fact that Guatemala did not require warning labels on cigarette packaging until 1990, provides some evidence that the government relied on the Industry's misrepresentations.⁹⁰ Finally, several courts, deciding similar cases, have concluded that a governing body or third party insurer were the most directly injured victims and therefore the most appropriate parties to file suit.⁹¹

The Guatemala decision also expanded upon the third *Holmes* factor, in stating that the claims against the Industry should be filed in a Guatemalan court rather than in the United States.⁹² Such a course of action, however, may virtually eliminate any chance of recovery.⁹³ For example, in many developing nations, death and injury to innocent people tends to be much more commonplace, making re-

89. Cf. *Blue Cross and Blue Shield of New Jersey, Inc.*, 36 F. Supp. 2d at 575 (describing how the plaintiff insurer kept substantial documentation of the medical care it provided to its beneficiaries).

90. See *Economics of Tobacco*, *supra* note 12 (stating that there were no warning labels on cigarettes until 1990 and currently there are no labeling or packaging requirements concerning nicotine or tar levels).

91. See *Service Employees Int'l Union Health and Welfare Fund*, 83 F. Supp. 2d at 86 (determining that if the plaintiff trust fund's accusations are true, then it is the most directly injured party); *Texas*, 14 F. Supp. 2d at 968 (concluding that the state is the most capable party to bring suit in protecting the health and well-being of the populace); see also *White v. Smith & Wesson*, No. 1:99 CV 1134, 2000 WL 664176, at *5 (N.D. Ohio Mar. 14, 2000) (concluding that a city had suffered a "concrete, particularized, and imminent" injury from grappling with the increased medical costs and crime arising from the defendant gun manufacturer). But see, e.g., *Laborers Local 17 Health and Benefit Fund*, 191 F.3d at 240 (claiming that individual smokers were the most directly injured victims); *International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund*, 34 F. Supp. 2d at 661 (utilizing the remoteness doctrine as a basis for denying a direct injury to a plaintiff health and welfare trust fund).

92. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 132 (asserting that claims by either the Guatemalan government or its citizens should be brought in Guatemalan courts).

93. Cf. Marc Galanter, *Legal Torpor: Why So Little Has Happened In India After the Bhopal Tragedy*, 20 TEX. INT'L. L.J. 273, 274-76 (1985) (stating that India's legal system charged substantial court fees, lacked a codified tort system, and lacked civil juries, thereby making it an inappropriate venue to hear the *Bhopal* case).

covery of damages less likely.⁹⁴ Many foreign court systems do not regularly hear the types of tort claims that are commonly heard in U.S. courts.⁹⁵ Moreover, courts in developing nations are often both extremely slow and inefficient.⁹⁶ All of these factors combined would make it virtually impossible for either an individual plaintiff or a developing nation to seek recovery in their own courts.⁹⁷

2. *Intentional versus Negligent Conduct*

The Guatemala decision also fails to make any substantive distinctions between intentional and negligent conduct.⁹⁸ The court summarily concluded that a direct injury requirement is the most important aspect of proximate cause analysis.⁹⁹ Thus, without a direct injury, a developing nation cannot recover for any damages, regardless of whether the Industry had acted intentionally.¹⁰⁰

Proximate cause analysis, however, often differentiates between intentional and negligent acts even in cases where a third party has

94. See, e.g., Hanson Hosein, *Unsettling Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L. & COMP. L. REV. 285, 300 (1993) (explaining that what may be considered an injury to personal rights in the United States may only be seen as a "vicissitude of life" in other cultures).

95. See *id.* at 301 (noting that victims of industrial disasters in the third world, for example, are not eligible for compensation).

96. See, e.g., *id.* (asserting that in India, the long delays of obtaining a remedy in a civil litigation, often make interlocutory relief the final judgment in a particular case, which diminishes the overall effectiveness of the justice system).

97. See *supra* notes 93-96 and accompanying text (examining the economic and legal limitations that a foreign plaintiff would encounter in filing suit against the tobacco industry in courts of her home country).

98. See *Blue Cross and Blue Shield of New Jersey*, 36 F. Supp. 2d at 580 (stating that proximate cause analysis draws "a sharp distinction between acts which are deliberate and intentional from those which involve mere negligence.").

99. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp.2d at 132 (quoting *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537 (1983)) (stating that under the remoteness doctrine "the availability of a remedy 'is not a question of the specific intent of the conspirators.'").

100. See *id.* (concluding that Guatemala cannot recover any damages even if the tobacco industry had acted intentionally).

claimed an injury.¹⁰¹ When determining liability for an intentional act, a court will often assess a defendant's culpability as well as the consequences of her actions.¹⁰²

Indeed, the Industry's behavior was intentional and the consequences of its actions were severe.¹⁰³ For example, the World Health Organization ("WHO"), which provides invaluable research and health care services to developing nations, recently uncovered memoranda and documents indicating that the Industry attempted to subvert its activities.¹⁰⁴ The Industry sought to cut the WHO's budget, undermine its credibility with other United Nations organizations, and even plant employees in the organization, in order to obfuscate the results of important research.¹⁰⁵ This example underscores the Industry's intentional and deliberate efforts to conceal the effects of tobacco consumption. Moreover, the consequences of the Industry's intentional actions have been catastrophic, as deaths from smoking-related illnesses in developing countries are expected to increase dramatically.¹⁰⁶

101. See *Blue Cross and Blue Shield of New Jersey, Inc.*, 36 F. Supp. 2d at 580 (asserting that the law has a substantial interest in dissuading intentional acts that harm innocent parties.)

102. See *id.* (quoting RESTATEMENT (SECOND) OF TORTS §435B (1965)) (stating that a court should consider whether the defendant "[h]as intentionally invaded the legally protected interests of another, his intention to commit the invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended.").

103. See *infra* notes 104-106 and accompanying text (discussing the extreme lengths the tobacco industry has undertaken to subvert public research activities).

104. See Mark Kaufman, *Tobacco Industry Scheme Alleged*, WASH. POST, Aug. 2, 2000, at A1 (summarizing the details of the "Boca-Raton Action Plan," which sought to subvert the WHO's activities in the developing world, where the industry was attempting to increase its market share).

105. See *id.* (describing how a secret industry ally, who was appointed to the WHO, attempted to "redirect" the organization's activities away from smoking prevention); see also Gordon Fairclough, *Philip Morris and Other Cigarette Firms Tried to Foil WHO, Agency's Staff Says*, WALL ST. J., Aug. 2, 2000, at A3 (analyzing tobacco industry documents, which sought to focus the industry's marketing campaigns in nations where the WHO had initiated tobacco prevention campaigns, thereby preventing the loss of any substantial market share).

106. See *Tobacco Deceit (Cont'd)*, WASH. POST, Aug. 3, 2000, at A20 (arguing that the Industry's attempts to improve its public standing have been rendered somewhat meaningless, given its recent campaign to undermine the WHO's credi-

When a defendant's actions are intentional and the harms that result from such actions are foreseeable, a plaintiff may be entitled to seek damages, even for a derivative harm.¹⁰⁷ For example, a parent or spouse may file a loss of consortium claim when a child or family member is either injured or killed.¹⁰⁸ Similarly, a developing nation should be able to recover damages from the Industry, due to the intentional and deliberate nature of the Industry's behavior and the foreseeable consequences of its actions.¹⁰⁹ Thus, by solely focusing upon a direct injury requirement, the Guatemala decision summarily overlooked an intentional harm with both adverse and foreseeable consequences.

II. IMPLICATIONS FOR FUTURE LAWSUITS

Shortly after Guatemala initiated its suit, several other foreign nations filed their own claims against the Industry, alleging similar legal theories.¹¹⁰ Most of these suits are now pending before the District Court of the District of Columbia, where they will be heard by Paul Friedman, the same judge who rendered the Guatemala decision.¹¹¹ Thus, these foreign governments are likely to encounter the

bility).

107. See *Blue Cross and Blue Shield of New Jersey, Inc.*, 36 F. Supp. 2d at 581 (examining certain exceptions to the general principle that a third party may not recover for certain injuries).

108. See *id.* (stating that a plaintiff would be liable to a family member when the consequences of the defendant's actions are foreseeable); cf. *Iron Workers Local Union No. 17 Insurance Fund*, 23 F. Supp. 2d at 781 (stating that an employer may seek damages for injuries against one of her employees).

109. Cf. *Blue Cross and Blue Shield of New Jersey, Inc.*, 36 F. Supp. 2d at 581 (comparing the role of a parent with the role of a non-profit health care provider and arguing that the same factual circumstances should enable the health care provider to recover damages from the tobacco industry).

110. See *supra* note 3 and accompanying text (stating that Ukraine, Bolivia, Nicaragua, Venezuela, and the Brazilian State of Goias filed suit against the tobacco industry).

111. See *Republic of Bolivia v. Philip Morris Cos., Inc.*, 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999) (transferring Bolivia's lawsuit to the District Court for the District of Columbia because the "[p]laintiff has an embassy in Washington, D.C., and thus a physical presence and governmental representatives there, whereas there isn't even a Bolivian restaurant anywhere near [this court]!"); see also Geyelin,

same legal obstacles as Guatemala, which may ultimately lead to the dismissal of their claims.¹¹²

The Guatemala decision, however, has not completely dissuaded foreign governments from initiating claims against the Industry.¹¹³ For example, in March 2000, the Canadian province of Ontario initiated a claim against Canadian and American tobacco manufacturers, seeking to recover the costs of treating its citizens' smoking-related illnesses.¹¹⁴ In particular, the province sought damages for the Industry's alleged conspiracy and fraud under RICO.¹¹⁵ Ontario's suit, however, has come under considerable scrutiny since most of its legal arguments are identical to those already rejected by the Guatemala court.¹¹⁶

Given these substantial legal obstacles, certain governments and international organizations began to seek alternate methods to hold the Industry accountable.¹¹⁷ The European Union ("EU"), for in-

supra note 11, at B7 (summarizing the Guatemala decision while analyzing its future implications for similar lawsuits).

112. See Geyelin, *supra* note 11, at B7 (predicting that the Guatemala decision will provide the basis for future dismissals).

113. See, e.g., Jeff Israely, *In Italy, Smoking Curbs Face an Uphill Battle: Health Minister Sets Out to Change a Culture*, BOSTON GLOBE, July 19, 2000, at A2 (describing the difficulties the Italian government will face in filing suit against the industry since the government actually produces one-third of the cigarettes consumed there).

114. See Julian Beltrame, *Ontario Files in U.S. Court a Lawsuit Against Group of Tobacco Companies*, WALL ST. J., Mar. 3, 2000, at B4 (summarizing the various legal theories underlying Ontario's lawsuit); Caroline Mallan, *Ontario Sues Global Tobacco Firms in U.S. Over Health Care Costs*, TORONTO STAR, Mar. 3, 2000, at NE22 (explaining that the Ontario government is hoping to recover approximately \$59 billion Canadian for the costs of treating its citizens' tobacco-related illnesses).

115. See Beltrame, *supra* note 114, at B4 (stating that the claim also accused the tobacco industry's lawyers of manipulating the American judicial system).

116. See Barry Brown, *Doubts Voiced on Ontario's Lawsuit*, BUFF. NEWS, Mar. 5, 2000, at A2 (asserting that Ontario's lawsuit merely represents an attempt to cover up the provincial government's lack of action in combating smoking). Ontario's lawsuit will also be heard in the Second Judicial Circuit, which has previously embraced the remoteness doctrine when considering similar cases against the tobacco industry. Cf. Laborer's Local 17 Health and Benefit Fund, 191 F.3d at 239 (concluding that an union health and benefit fund was too remote a party to obtain standing against the tobacco industry, since its injuries were dependent upon injuries exacted on a third party - the individual smokers).

117. See *infra* notes 118-122 and accompanying text (examining lawsuits to

stance, has sued the industry for its alleged involvement in cigarette smuggling.¹¹⁸ In particular, the EU is arguing that the Industry's smuggling activities are responsible for billions of dollars in lost tax revenue.¹¹⁹ Moreover, supporters of the lawsuit have claimed that cigarette smuggling has caused escalating levels of crime and violence.¹²⁰ The EU suit, however, may already be in jeopardy since the U.S. District Court for the Northern District of New York recently dismissed a similar claim by the Canadian government, which sought damages associated with the costs of cigarette smuggling.¹²¹ In dismissing the case, the district court cited the remoteness doctrine, ruling that the Industry's alleged violations were not the proximate cause of the government's injury.¹²² Thus, the EU suit, although grounded in different legal theories than Guatemala's claim, may encounter similar obstacles.

prevent cigarette smuggling by both Canada and the EU).

118. See Suzanne Daley, *Europeans Suing Big Tobacco In U.S.*, N.Y. TIMES, Nov. 7, 2000 at A1 (stating that smuggling has enabled the industry to sell cigarettes at twenty to thirty percent less than the legal price in countries such as Spain and Italy). Compare *Up In Smoke*, WALL ST. J. EUR., July 24, 2000, at 12 (criticizing the EU's lawsuit, arguing that the industry has actually cooperated with European governments in combating smuggling), with *EU Should File Criminal Charges*, SUN SENTINEL (FT. LAUDERDALE, FLA.), July 23, 2000, at 4G (arguing that the EU should file criminal charges against the tobacco industry in addition to its civil suit).

119. See Thanassis Cambanis, *EU Body, Alleging Smuggling, Will Sue Cigarette Makers in the U.S.*, WALL ST. J. EUR., July 21, 2000 at A9 (stating that cigarette smuggling has caused the EU to lose 4.7 billion euros in tax revenue in 1998).

120. See, e.g., *Tobacco Galore: Smuggling: Gordon Brown's Tobacco Tax Teaser*, ECONOMIST (Britain), Mar. 18, 2000, available at 2000 WL 8141200 (asserting that "tobacco smuggling is Britain's fastest growing category of crime."); *Rocky Relations (Spain and Great Britain Tangle Over Gibraltar)*, ECONOMIST, June 15, 1995, at 58 (describing how the smuggling of tobacco and drugs by individuals in Gibraltar has caused an increase in crime in Spain).

121. See Attorney Gen. of Canada v. RJ Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134, 143 (N.D.N.Y. 2000) (citing the Revenue Rule, which enables a U.S. court to decline the enforcement of a foreign nation's tax laws, because such cases are best handled by either the foreign government's executive and legislative bodies); see also *Canada Files Appeal of U.S. Court Ruling on Smuggling Suit*, WALL ST. J., July 31, 2000, at B2 (summarizing the Canadian government's efforts to appeal the district court's decision).

122. See *id.* at 151 (concluding that lost tax revenue, increased tobacco consumption, and increased expenditures on law enforcement are not a direct injury under RICO).

Finally, a recent class action victory by Florida smokers may further strengthen some of the legal principles underlying the remoteness doctrine.¹²³ In *R.J. Reynolds Tobacco Co. v. Engle*,¹²⁴ a jury awarded Florida smokers \$145 billion in punitive damages, after concluding that the Industry willfully concealed the health risks associated with smoking.¹²⁵ The success of such class action suits will likely raise concerns about the risks and inequities associated with duplicative recoveries.¹²⁶ Courts may now cite the Florida verdict to underscore the risk of multiple recoveries in tobacco litigation, thereby making it even more difficult for a foreign government to recover any damages.¹²⁷

Given all of the legal obstacles foreign governments face in challenging the Industry, they may be forced to look for more innovative ways to bring their claims, such as the doctrine of *parens patriae*.¹²⁸

123. See Marc Kaufman, *Tobacco Suit Award: \$145 Billion; Fla. Jury Hands Industry Major Setback*, WASH. POST, July 15, 2000, at A1 (contrasting differing legal and political opinions of the largest punitive damages award ever rendered). But see Milo Geyelin & Gordon Fairclough, *Tobacco Firms Maneuver to Move Case*, WALL ST. J., July 25, 2000, at B6 (analyzing the tobacco industry's strategy of removing the class action suit to federal court, which is likely to be much more critical of the jury's award).

124. The final decision was not published. See generally *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996) (allowing Florida plaintiffs to initiate a class action suit against the tobacco industry).

125. See Milo Geyelin & Gordon Fairclough, *Taking a Hit: Yes, \$145 Billion Deals Tobacco a Huge Blow; But Not a Killing One*, WALL ST. J., July 17, 2000, at A1 (stating that the \$145 billion award will likely be reduced on appeal given many judges' growing hostilities about mass tort claims, as well as the tobacco industry's successes in affecting state laws).

126. See Holmes, 503 U.S. at 269 (recognizing the difficulty the court system would have in estimating the damages of indirectly injured plaintiffs); *Hawaii Health & Welfare Trust Fund For Operating Eng'rs v. Philip Morris, Inc.*, 52 F. Supp. 2d 1196, 1199 (D. Haw. 1999) (stating that the plaintiff trust fund is simply copying suits brought by states' attorneys general and other class action suits).

127. See Schwartz, *supra* note 5, at 435 (citing the dangers of allowing governments to recover from the Industry while class action suits are also being pursued for the same injuries).

128. See *infra* notes 153-186 and accompanying text (analyzing the doctrine of *parens patriae* as a method by which a government may obtain standing against the industry).

III. RECOMMENDATIONS

A. THE TOBACCO INDUSTRY'S BEHAVIOR IN THE DEVELOPING WORLD

Under limited circumstances, a developing nation may successfully obtain standing against the Industry by emphasizing the severity of the Industry's fraud while demonstrating how tobacco consumption affects the general health and economic well being of its citizenry.¹²⁹ The combination of such factors may allow a developing nation to obtain standing in the United States under the doctrine of *parens patriae*, which enables a sovereign entity to bring suit on behalf of its people.¹³⁰

Before discussing the doctrine of *parens patriae*, it is necessary to examine the severity of the Industry's behavior in the developing world and to discuss how such behavior may ultimately affect the Industry's liability. In comparison to their American counterparts, individuals in the developing world tend to be given substantially less notice about the dangers associated with smoking.¹³¹ For exam-

129. See *infra* notes 130-184 and accompanying text (proposing an alternative method by which a foreign government may obtain standing against the tobacco industry).

130. See BLACK'S LAW DICTIONARY, *supra* note 83, at 1114 (defining *parens patriae* as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort, and welfare of the people."). Courts have differed on whether a foreign nation may file a suit under the doctrine of *parens patriae*. Compare *Coordination Council for N. Am. Affairs v. Northwest Airlines Inc.*, 891 F. Supp. 4, 7 n. 3 (D.D.C. 1995) (stating that "[f]oreign sovereigns are equally entitled to protect their citizens and may claim *parens patriae* standing to the same extent as a state."), and *Pfizer, Inc. v. Lord*, 522 F.2d 612, 618-19 (8th Cir. 1975) (acknowledging the possibility that foreign nations may obtain *parens patriae* standing by discussing how the domestic limitations on the doctrine apply to foreign governments), with *Estados Unidos Mexicanos v. Decoster*, 59 F. Supp. 2d 120, 123-124 (D. Maine 1999) (holding that a sovereign nation cannot assert a quasi-sovereign interest in an American court and therefore cannot bring suit as *parens patriae*).

131. See THE WORLD BANK: CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMIC OF TOBACCO CONTROL 30 (1999) [hereinafter THE WORLD BANK] ("People's knowledge of the health risks of smoking appears to be partial at best, especially in low and middle income countries where information about these hazards is limited."). According to the World Bank's report, sixty-one percent of Chinese adult smokers "believed that cigarettes did them little or no harm." *Id.*

ple, many developing nations do not require any type of warning labels on cigarettes, like those required in the United States.¹³² Thus, it becomes more difficult for the Industry to claim that individual smokers have knowingly engaged in an unreasonably dangerous behavior.¹³³ Since individual smokers in the developing world are less likely to be placed on notice of the dangers associated with smoking, tobacco manufacturers cannot use an assumption of risk defense,¹³⁴ which generally shields the Industry from liability in the United States.¹³⁵

Tobacco prevention and education programs in the developing world also tend to be somewhat disjointed and less effective.¹³⁶ Thus, citizens in the developing world tend to receive little if any constructive notice from their governments.¹³⁷ In Honduras, only fifty percent of individuals aged fifteen through thirty knew that smoking caused lung cancer and other types of diseases.¹³⁸ In many areas of Latin

132. See 15 U.S.C. § 1331(b) (1994) (requiring a conspicuous warning label on both cigarette packaging sold in the United States and on any cigarette advertisements); see also *Economics of Tobacco*, *supra* note 12 (stating that Guatemala did not require any type of health warnings on cigarette packaging until 1990); THE WORLD BANK, *supra* note 131, at 47 (asserting that in 1991, only 77 countries required warning labels on cigarette packaging, and by American standards, many of these labels would be considered to be extremely weak).

133. See Johnson, *supra* note 13, at 6-7 (stating that a foreign plaintiff would not be pre-empted by the Cigarette Labeling Act, which creates "an assumption of risk defense that is virtually insurmountable").

134. See BLACK'S LAW DICTIONARY, *supra* note 83, at 123 (stating that an assumption of risk may serve as a defense to a negligence claim if a defendant can successfully prove that the plaintiff knew about the risks and dangers associated with a particular activity).

135. See generally Roysdon, 623 F. Supp. at 1192 (stating that the harmful effects of tobacco are generally known to the community, and thus cannot be declared an unreasonably dangerous substance); see also Johnson, *supra* note 13, at 6-7 (stating that cigarette warning labels are not required on cigarettes exported from the United States).

136. See WHO Fact Sheets, *supra* note 13 (stating that "[a]lthough many countries in Latin America have passed tobacco control legislation, the legislation tends to be weak and contain loopholes which serve to the advantage of the tobacco companies.").

137. See Johnson, *supra* note 13, at 29 (stating that individuals in the developing world are generally less aware of the health effects of smoking).

138. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SMOKING AND HEALTH IN THE AMERICAS: A 1992 REPORT OF THE SURGEON GENERAL, IN

America, even medical professionals are unaware of the risks associated with tobacco.¹³⁹ In addition to the lack of effective educational programs, developing nations are less likely to restrict smoking in public buildings or workplaces.¹⁴⁰ For example, in Guatemala, smoking is permitted in schools and there are no restrictions on selling cigarettes to minors.¹⁴¹ Thus, the Industry has exacted considerable harm on an extremely unsuspecting populace, making a stronger case for liability.

The Industry takes advantage of this lack of awareness through developing nations' mass media, which is not subject to the same types of restrictions that exist in the United States.¹⁴² In particular, the Industry targets much of its advertising toward women, adolescents, and children.¹⁴³ For example, cigarette manufacturers often advertise

COLLABORATION WITH THE PAN AMERICAN HEALTH ORGANIZATION 79 (1992) [hereinafter SMOKING AND HEALTH] (contrasting various surveys on individuals' attitudes toward smoking and health).

139. See *WHO Fact Sheets*, *supra* note 13 (describing the lack of awareness and prevention efforts in many areas of Latin America); see also SMOKING AND HEALTH, *supra* note 138, at 79 (citing a 1990 study where only thirty percent of the physicians in Paraguay believed that smoking was undesirable).

140. See, e.g., SMOKING AND HEALTH, *supra* note 138, at 155 (stating that in Guatemala, Venezuela, and Panama, smoking is not prohibited in health facilities).

141. See *id.* (comparing different restrictions on cigarette use in the western hemisphere); see also *Economics of Tobacco*, *supra* note 12 (analyzing tobacco regulations and restrictions in various nations).

142. See *WHO Fact Sheets*, *supra* note 13 (asserting that the tobacco industry's advertising campaigns, combined with a lack of public awareness, have created an atmosphere where smoking is socially acceptable); Johnson, *supra* note 13, at 28 (stating that the tobacco industry's advertising campaigns in the developing world are even more effective due to the lack of regulations or advertising restrictions); see also Yach, *supra* note 55 (stating that "[f]or many countries, even rudimentary protection against tobacco imagery does not exist. Instead the Marlboro Man rides high over the cities of many countries in Asia, East and Central Europe and Latin America.").

143. See *Advocacy for Policy Change*, available at <http://tobacco.who.int/en/advocacy/> (last visited July 12, 2000) (asserting that the tobacco industry has focused its advertising and marketing campaigns on women and children while outlining ways the international community can combat such efforts); *Big Tobacco Abroad*, WASH. POST, July 13, 1998, at A20 (arguing that the United States government should stop subsidizing tobacco marketing overseas, which attempts to addict women and children through "sophisticated marketing campaigns featuring female pop stars, giveaways of stylish lighters and relentless advertising."); see also THE WORLD BANK, *supra* note 131, at 31 (stating that even in the developed

in comic books, which are distributed in elementary schools.¹⁴⁴ Such advertisements often equate smoking to health and affluence.¹⁴⁵ Moreover, the health problems in the developing world are further compounded by the higher potency of cigarettes sold in many developing nations as compared to the United States.¹⁴⁶

As a result of the Industry's actions, tobacco consumption is expected to be the leading cause of death worldwide by the year 2030.¹⁴⁷ Even worse, by the year 2020, seventy percent of all tobacco-related deaths will occur in the developing world, where governments are least able to respond to complex health problems.¹⁴⁸ For these reasons, the Industry's actions in the developing world have been equated to a human rights violation.¹⁴⁹ Given the lack of aware-

world, youth and adolescents often lack the ability to make informed choices about tobacco).

144. See Heidi S. Grunner, *The Export of U.S. Tobacco Products to Developing and Previously Closed Markets*, 28 LAW & POL'Y INT'L BUS. 217, 228-231 (1996) (examining different methods by which the tobacco industry has expanded its sales in the developing world).

145. See Lucien J. Dhooze, *Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations*, 22 FORDHAM INT'L L.J. 355, 389 (1998) (describing how marketing campaigns in the developing world have increased overall sales of tobacco throughout the 1990's); see also Susan Headden, *The Marlboro Man Lives! Restrained at Home, Tobacco Firms Step Their Marketing Overseas*, U.S. NEWS AND WORLD REP., Sept. 21, 1998, at 58 (describing how tobacco manufacturers engage in a practice called "brand stretching," which enables them to promote their names on non-tobacco products).

146. See Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*, 15 WIS. INT'L L.J. 29, 36 (1996) (arguing that the exportation of tobacco has created enormous health problems in the developing world and impeded economic growth, thus warranting greater monitoring and restrictions).

147. See THE WORLD BANK, *supra* note 131, at IX (stating that tobacco use will account for 10 million deaths per year by 2030).

148. See *Ad Hoc Inter-Agency Task Force on Tobacco Control: Report of the Secretary General*, U.N. ESCOR, substantive session of 2000, Provisional Agenda Item 7(d) at 5, U.N. Doc. E/2000/21 (2000), available at <http://tobacco.who.int/en/united-nations/> (asserting that tobacco use will be responsible for approximately one in eight deaths by the year 2020).

149. See Dhooze, *supra* note 145, at 412-16 (arguing that the tobacco industry and the United States government have violated the personal and societal rights of individuals living in the developing world). The author of the article argues that the subsidization and exportation of tobacco products violates the right to life itself, which was recognized in the U.N. Declaration of Human rights. See *id.* at 415-16

ness, the extreme level of fraud and misrepresentations, and the broad and devastating health effects, individual plaintiffs in a developing nation may stand a better chance of recovery.¹⁵⁰ Although there appears to be an undeniable harm, a lack of resources prevents most individual plaintiffs in the developing world from bringing their cases against the Industry.¹⁵¹ By analyzing the practical considerations that prevent an individual plaintiff from filing suit, as well as the broad effects of tobacco consumption on a developing nation, a compelling case can be made for *parens patriae* standing.¹⁵²

B. PARENS PATRIAE STANDING

Under the doctrine of *parens patriae*, a state can receive standing to bring a claim when it seeks to further the quasi-sovereign interests of its people.¹⁵³ Generally, a governing body may assert a quasi-sovereign interest when it seeks to protect either the physical or economic well being of its people or when it attempts to maintain its position in the federal system.¹⁵⁴ Thus, to obtain *parens patriae* standing,

(noting that advertisements, sponsorships, promotions, and the targeting of specific groups have been primarily responsible for the growth in tobacco consumption). Dhooze also argued that the tobacco industry has violated a right to health, which was addressed in both the U.N. Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights. *See id.* at 419-23 (asserting that the United States has ignored the practices of the tobacco industry, which have successfully circumvented modest tobacco control and prevention efforts in other nations).

150. *See* Johnson, *supra* note 13, at 6 (stating that Third World plaintiffs would have a compelling case for relief).

151. *See, e.g., Pan American Health Organization, supra* note 14 (stating that 75.2% of the Guatemalan people live in poverty).

152. *See infra* notes 153-183 and accompanying text (analyzing the doctrine of *parens patriae* and applying it to tobacco litigation in the developing world).

153. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601-03 (1982) (explaining that a quasi-sovereign interest can be broadly construed as an interest that a state has in the well being of its citizens, while citing cases to develop a more precise understanding of this unique interest).

154. *See id.* at 607 (concluding that quasi-sovereign interests are best articulated on a case by case basis); *see also* Lisa Moscati Hawkes, Note, *Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues*, 21 CORNELL INT'L L.J. 181, 187-88 (1988) (distinguishing a quasi-sovereign interest from a state's proprietary interest or an interest that an individual citizen may seek to remedy through the court system).

the state's claim must transcend its own proprietary interests,¹⁵⁵ as well as its citizens' own individual interests.¹⁵⁶ Moreover, the effects of the defendant's actions have to be felt by a substantial majority of a state's citizenry though the most direct injury may only affect a limited number of individuals.¹⁵⁷ To avoid the chance of a duplicative recovery, however, the injury must be one that cannot be litigated by an individual plaintiff.¹⁵⁸ In short, *parens patriae* standing is most appropriate when a defendant has exacted significant harm upon a substantial number of people, but the injury is not readily justiciable by individual plaintiffs.¹⁵⁹

155. *Cf. In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 134 (deciding that Guatemala cannot obtain *parens patriae* standing because it is only seeking to recover damages to its own treasury, which is a proprietary interest).

156. *See id.* (stating that *parens patriae* should not be used when a more appropriate party than the state is capable of bringing suit). Even though seventy-five percent of the Guatemalan people live in poverty, the Guatemala court somehow concluded that, each of the plaintiffs was capable of filing suit on their own. *Id. Cf. Pfizer, Inc.*, 522 F.2d at 617 (refusing to allow the plaintiff governments to sue on behalf of their citizens who are "legally entitled to sue on their own behalf, but as a practical matter generally unable to do so").

157. *See Pennsylvania v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976) (articulating that a state may assert *parens patriae* standing when the defendant's actions have "substantial generalized economic effects").

158. *See id.* ("[I]t is entirely clear that a state never has standing on the basis of personal claims assigned to it by individuals."); *see also In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 134 (denying Guatemala *parens patriae* standing because "individual Guatemalan smokers are entirely capable of protecting themselves"); *but see Pan American Health Organization*, *supra* note 13 (stating that 75.2 percent of the Guatemalan people live in poverty).

159. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 600 (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)) ("[P]arens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is . . . necessary to be exercised in the interests of humanity, and for the prevention of injury for those who cannot protect themselves."); *see also Kleppe*, 533 F.2d at 675, n.42 (distinguishing the differences between a suit where the remedies are not legally cognizable and a claim where an individual plaintiff would be the most appropriate party to assert a particular interest).

C. APPLICATION OF PARENS PATRIAE TO THE TOBACCO LITIGATION

1. *A Developing Nation's Health and Physical Well Being*

When invoking parens patriae, a government must articulate an injury either to the health and well being of its people or to the general economy.¹⁶⁰ As previously discussed, tobacco consumption in the developing world has had a devastating effect on millions of citizens.¹⁶¹ At the same time, the effects of the Industry's behavior have gone beyond the injuries of individual plaintiffs, who, as demonstrated previously, most likely lack the ability to file their own claims.¹⁶² Tobacco consumption has de-stabilized fledgling health care systems, adversely affecting both smokers and non-smokers.¹⁶³ For example, in developing nations, the rise in tobacco-related illnesses has occurred as governments have simultaneously attempted to grapple with common infectious diseases that have long been remedied in Western nations.¹⁶⁴ Instead of providing greater access to vaccinations and preventive care, developing nations' health care systems are struggling to provide treatments for lung cancer and respiratory diseases.¹⁶⁵ Moreover, the effects of second hand smoke are

160. See Alfred L. Snapp & Son, 458 U.S. at 607 (acknowledging certain basic parameters of parens patriae even though the definition of a quasi-sovereign interest must be formulated on a case-by-case basis).

161. See *supra* notes 130-152 and accompanying text (outlining how the lack of warning labels, advertising restrictions, and public education programs, combined with the industry's fraud and misrepresentations in the developing world will make tobacco use the leading cause of death in the world by the year 2030).

162. See, e.g., *Pan American Health Organization*, *supra* note 14.

163. See Yach, *supra* note 55 (underscoring the severity of tobacco consumption in the developing world and advocating for World No Tobacco Day, which is being used to raise awareness about tobacco and develop a world wide public health agenda).

164. See *id.* (comparing the impact of tobacco consumption in the developed world, where most infectious diseases have been brought under control with the plight of the developing world, where "infectious diseases and under-nutrition co-exist with a rising incidence of tobacco-induced chronic illnesses"). See, e.g., *Pan American Health Organization*, *supra* note 14 (stating that in Guatemala, intestinal parasitic diseases are one of the leading causes of death nationwide.).

165. See Yach, *supra* note 55, at 2 (describing the effect tobacco consumption has had upon third world health care systems while emphasizing the need for to-

even more pronounced in developing nations, where there tend to be fewer restrictions on smoking in public spaces than in the developed world.¹⁶⁶ Thus, the Industry's behavior can place an enormous strain on a developing nation's already overburdened health care system, jeopardizing the health and well being of a majority of its citizens, while providing a strong basis for *parens patriae* standing.¹⁶⁷

By analyzing the broad health consequences of tobacco consumption in the developing world, a nation such as Guatemala can make a compelling case for *parens patriae* standing. First, even though a limited number of people have suffered a direct injury such as a tobacco-related illness, a significant majority will be forced to grapple with the long term consequences of smoking, such as a diminished and ineffective health care system.¹⁶⁸ In fact, a government is the only party that may vindicate such a quasi-sovereign interest, which affects the general health and well being of the entire nation.¹⁶⁹ Second, most private plaintiffs cannot file claims on their own behalf.¹⁷⁰ The

bacco prevention, which can be funded through a higher excise tax on tobacco products).

166. See THE WORLD BANK, *supra* note 131, at 26-27 ("Adults exposed chronically to others' tobacco smoke also face small but real risks of lung cancer and higher risks of cardiovascular disease, while the children of smokers suffer a range of health problems and functional limitations."); see also SMOKING AND HEALTH *supra* note 138, at 154-55 (stating that in Columbia, Panama, Paraguay, Peru, and Guatemala smoking is not prohibited in schools). Moreover, in many nations, "enforcement is weak or non-existent." *Id.*

167. See *American Tobacco Co.*, 14 F. Supp. 2d at 962-63 (concluding that Texas has a quasi-sovereign interest in ensuring the stability of its Medicaid program and protecting the health and well being of its citizens).

168. See *Kleppe*, 533 F.2d at 675 ("[I]t has been held sufficient that the direct impact of the alleged wrong be felt by a substantial majority, though less than all, of the state's citizens, so that the suit can be said to be for the benefit of the public.").

169. Cf. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (holding that a state had a quasi-sovereign interest in protecting "all the earth and air within its domain" when the defendant copper companies had repeatedly discharged noxious gas over the state's territory); *Missouri v. Illinois*, 108 U.S. 208, 241 (1901) (holding that Missouri was the proper entity to protect the health and comfort of its citizens when Chicago had been dumping sewage into the Mississippi River, adversely affecting the drinking water in several cities and towns).

170. See *Kleppe*, 533 F.2d at 674 (prohibiting *parens patriae* standing when an individual plaintiff could litigate a particular claim); *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 134 (asserting that *parens patriae*

risk of an individual plaintiff initiating a suit is greatly diminished since most citizens in a developing nation lack the resources to file individual claims, and are denied access to their own court systems.¹⁷¹ Thus, when examining the overall health consequences of tobacco consumption, the state is the only possible party that can protect the physical well being of its citizens, providing a compelling case for *parens patriae* standing.¹⁷²

2. *A Developing Nation's Economic Well Being*

A developing nation may also obtain *parens patriae* standing against the Industry by claiming an injury to its economic well being.¹⁷³ Excessive tobacco consumption adds significant costs to a nation's health care industry, which is often passed on to non-smokers,

standing is inappropriate when individual parties are capable of bringing suit).

171. *But see* Pfizer, Inc., 522 F.2d at 617 (arguing that the practical limitations of litigating a case, such as the economic status of the plaintiffs, should not give rise to a *parens patriae* action). However, the interests represented by *parens patriae* are best articulated on a case by case basis. *See* Alfred L. Snapp & Son, 458 U.S. at 607; *see also* Service Employees Int'l Union Health and Welfare Benefit Fund v. Philip Morris, Inc., 83 F. Supp. 2d 70, 79-80 (D.D.C. 1999) (establishing differing precedent from four circuit courts while discussing the importance of a "flexible and responsive" court system that enables plaintiffs that have clearly been wronged to have their day in court); American Tobacco Co., 14 F. Supp. 2d at 962 (underscoring that the "only hard and steadfast rule" in evoking a quasi-sovereign interest is that a state must be more than a nominal party).

172. Some have also argued that subrogation represents the most appropriate way for a government to seek compensation for the costs of treating its citizens for smoking-related illnesses. *See* Dagan & White, *supra* note 16, at 394-98 (arguing that subrogation would limit multiple claims by individual plaintiffs while providing governments the power to recover public money spent on "preventative and ameliorative" health care costs). *But see* Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771, 778 n.7 (N.D. Ohio 1998) (articulating the limits of subrogation, which would require the subrogee "to offer individual proofs (and overcome affirmative defenses) for each smoker as to whom subrogation is claimed.").

173. *See* Kleppe, 533 F.2d at 674 ("[E]ven where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects."). *But see* Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972) (stating that an injury to the general economy is "no more a reflection of injuries to the business or property of consumers" for which individual plaintiffs may file antitrust claims under the Clayton Act, thereby denying *parens patriae* standing under this particular circumstance).

in the form of higher taxes.¹⁷⁴ Moreover, tobacco consumption often leads to lost productivity, which may have a further detrimental effect on economies in the developing world.¹⁷⁵ In fact, even the Guatemala decision acknowledged the possibility that the developing nation may be able to assert an interest in the effect that tobacco consumption has had on its economy.¹⁷⁶ Thus, a developing nation may obtain *parens patriae* standing based upon the effect tobacco consumption has had on its overall economy.¹⁷⁷

D. LIMITS ON PARENS PATRIAE STANDING

While *parens patriae* standing may afford a developing nation an opportunity to file suit against the Industry, the doctrine also contains significant limits. First, in order to eliminate the risk of multiple recoveries, *parens patriae* standing should be restricted to only the poorest of nations, where individual plaintiffs are unlikely to file their own suits.¹⁷⁸ The poverty rate in Guatemala, totaling three-quarters of the population, provides an example of a nation that would be considered sufficiently poor as to qualify for *parens patriae* standing.¹⁷⁹ Second, a developing nation also needs to articulate an

174. See THE WORLD BANK, *supra* note 131, at 32-33 (estimating that tobacco consumption has increased health care costs in developed countries between 6 and 15% while acknowledging the effect on health care systems in the developing world is more difficult to quantify since "the epidemic of tobacco-related diseases is at an earlier stage.").

175. Cf. TOLLISON & WAGNER, *supra* note 62, at 62 (citing a study by the Office of Technology Assessment, which concluded that in the United States, the estimated "cost of lost production ranged from \$27 billion to \$61 billion for 1985, with a 'best' estimate of \$43 billion.").

176. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 134 (asserting that Guatemala might be able to recover for the substantial generalized economic effects of tobacco consumption but failed to do so when it "stated that the damages it is seeking are 'to its own business or property (its treasury) and not to the general economy'").

177. See *American Tobacco Co.*, 14 F. Supp. 2d at 962 (holding that the millions of dollars Texas had spent on treating tobacco-related illness had injured the state's economy, thereby invoking a quasi-sovereign interest).

178. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d at 134 (rejecting *parens patriae* standing because individual Guatemalan smokers were capable of bringing their own claims).

179. See *Pan-American Health Organization*, *supra* note 14 (stating that 58% of the Guatemalan population lives in extreme poverty).

injury beyond that of its individual citizens such as a greatly diminished health care system or injury to an already unstable economy.¹⁸⁰ Moreover, a government must be able to prove that its expenditures on smoking-related illnesses has inhibited its ability to grapple effectively with basic health care needs, such as providing immunizations.¹⁸¹ Finally, *parens patriae* standing should be limited to instances where an "undeniable harm"¹⁸² has been exacted on a substantial portion of a state's population.¹⁸³ Thus, a government would need to underscore the severity of the Industry's fraud and manipulation unique to the developing world, while discussing the long-term consequences of such behavior upon an unsuspecting populace.¹⁸⁴

CONCLUSION

Our court system faces a difficult task in balancing the needs of developing nations that have been subject to the worst of the Industry's fraud with the need to prevent an avalanche of claims from numerous third parties.¹⁸⁵ The remoteness doctrine, which formed the basis of the Guatemala decision, fails to account adequately for the unique harms that the Industry has exacted upon the developing

180. See *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607 (concluding that in order to assert a quasi-sovereign interest, the state needs to be more than a "nominal party."). See generally *Hawkes*, *supra* note 154, at 191 ("Courts view skeptically a State's arguments regarding injury to its general economy as a basis for *parens patriae* standing.").

181. See *Yach*, *supra* note 55 (examining how smoking-related illnesses pose a double burden on developing nations, since their health care systems are still attempting to cope with common infectious diseases that have long since been remedied in the developed world).

182. *Kleppe*, 533 F.2d at 675 n.42.

183. Cf. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 609 (holding that job discrimination against an identifiable group of Puerto Rican citizens working in Virginia indirectly harms all Puerto Rican citizens, thereby allowing the Commonwealth to assert a quasi-sovereign interest).

184. See *supra* notes 131-152 and accompanying text (discussing the lack of warning labels and advertising restrictions in the developing world, the Industry's outright attempts to appeal to children, the higher potency of cigarettes in Third World nations).

185. See generally *Schwartz*, *supra* note 5, at 427 (stating that the remoteness doctrine is needed to prevent multiple recoveries for a single harm).

world.¹⁸⁶ Moreover, the remoteness doctrine overlooks distinctive conditions in a developing nation that would virtually eliminate the risks of multiple recoveries from different parties.¹⁸⁷

In contrast, the doctrine of *parens patriae* would enable the poorest of developing nations to obtain standing against the Industry while preventing numerous claims from more developed nations like the United States or Canada. Given the catastrophic consequences of tobacco consumption in the developing world, *parens patriae* standing provides both an equitable and balanced approach for adjudicating claims by the developing world.

186. See *supra* notes 131-152 and accompanying text (discussing the industry's strategies of marketing to women and children, the lack of warning labels, and the lack of education and prevention programs).

187. See *Statutory Interpretation*, *supra* note 44, at 1066 (stating that the doctrine of fraud provides a more useful framework than the remoteness doctrine for examining claims by third parties).